

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 326 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

BHAILUBHAI JANIYABHAI

Appearance:

Mr. M.A.Bukhari,A.P.P. for the appellant.

Mr. B.A.Surti, Advocate for the respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 13/09/96

ORAL JUDGEMENT : (Per : Kadri,J.):-

The appellant- State of Gujarat has filed this appeal under section 378 of the Code of Criminal Procedure,1973 challenging the legality and validity of the judgment and order dated January 7,1985 passed by the

learned Additional Sessions Judge, Valsad at Navsari, in Sessions Case no.60/84, whereby the respondent-accused was acquitted of the offence under section 302 of the Indian Penal Code.

2. Briefly stated the prosecution case is as under:

Deceased Jerambhai Juliyabhai along with his wife Fulaki and minor son Jagdish was residing at village Vadpada, Taluka : Chikhali, District : Valsad. Daughter of deceased Jeram, namely Kanta was married with one Mangubhai Vestabhai, who also resided in the same village. It is also alleged that the respondent-accused had a suspicion that mother of Mangubhai Vestabhai namely Shanta was a witch. Prior to one year of the incident, the servant of the respondent namely Roshan had expired and the respondent had strong suspicion that because of witch craft practiced by Shantaben, who was mother of Mangubhai Vestabhai, said Roshan had died. The incident in question took place on July 27,1984 at about 7.00 p.m. when the deceased was returning to his house after buying bundle of bidies from near S.T.Stand and when he reached near the house of Chhaganbhai Ravji, the respondent-accused met him and asked him whether his son-in-law Mangubhai Vesta was visiting his house or not. The deceased replied that his son-in-law was not visiting his house. The respondent-accused got excited and gave one kick blow on the abdominal part and one kick blow on the leg of the deceased. It is the prosecution case that son Jagdish was playing near the place of incident and, therefore, he came to the rescue of the deceased. According to the prosecution case, Jagdish thereafter went to call his aunt Jiniben and his sister Kanta. After arrival of Jiniben and Kanta, the deceased who was seriously injured, was taken to his house. During night time also the deceased was complaining of severe pain in the stomach region. On the next day morning, Jagdish went to call Mangubhai Vestabhai, who was son-in-law of the deceased. Another son-in-law of the deceased namely Ambu was also called. The deceased in company of his wife Fulki, Mangubhai Vesta and Ambubhai was taken to Khergam Police Outpost. At Khergam Police Outpost, deceased lodged complaint, which was recorded by Police Jamadar Rameshchandra Eknath and the same was treated as occurrence report. After recording of the complaint, the deceased was taken to Khergam District Panchayat Dispensary where the deceased was examined by Dr. Gulabbhai Patel. As the condition of the deceased was serious, Dr. Patel gave him pain killer injection and referred him to Medical Hospital at Valsad. As per the prosecution case, as no room was available at Valsad Hospital, the deceased was taken to Navsari Hospital. At

the Navsari Hospital, the deceased was declared dead by the medical officer incharge of the Hospital on 28.7.1984 at about 6.30 p.m. Message about the death of the deceased was sent to Chikhali Police Station where it was noted by the Police Jamadar Ramdas Nathhubhai. The occurrence report was accordingly entered into non-cognizable register and section 302 of I.P.C. was added in it. Inquest on the dead body of deceased Jeram was held and thereafter dead body was sent for autopsy to the medical officer, Navsari Civil Hospital. The autopsy was performed by Dr.Raxaben Ranchhodji Desai, medical officer incharge of the Hospital. P.S.I. Mr.Chauhan, who was incharge of Chikhali Police Station took over investigation and went to the scene of offence at 19.30 hours. He recorded statements of witnesses Maniben Chhitubhai, Chhaniben Jivalabhai and Sitaben Naginbhai. On the next day at about 6.00 a.m. senior P.S.I. Mr.V.D.Rathod of Chikhali Police Station took over the investigation from P.S.I. Mr. Chauhan. He went to the scene of offence and drew panchnama of scene of offence in presence of two independent panchas. P.S.I. Rathod recorded statements of Chhagan Ravji, Govind Chhagan, Ziniben Chhagan, Jagdish Jeram, Ziniben Magan, Kantaben Mangubhai, Nagaliben Jashubhai and others. On 29.7.1984 the accused came to be arrested by arrest panchnama. After receiving the postmortem report from Navsari Hospital and after completing usual investigation, chargesheet came to be filed against the accused on 8.8.1984 in the Court of learned Judicial Magistrate, First Class, Chikhali. As the offence under section 302 I.P.C. is exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions for trial, which was numbered as Sessions Case no.60/84 in the Court of learned Additional Sessions Judge, Valsad at Navsari.

3. Charge at exh.1 was framed against the respondent-accused of the offence under section 302 of I.P.C. which was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried.

4. The prosecution, in order to prove its case against the accused, examined following witnesses :-

- (1) Abdulgani Allarakha Shaikh, PW.1, Exh.5
- (2) Jagdishbhai Jerambhai (child witness) PW.2, Exh.7
- (3) Kantaben Mangubhai, PW.3, Exh.8
- (4) Mangubhai Vestabhai, PW.4, Exh.9
- (5) Maniben Chhibubhai, PW.5, Exh.10

- (6) Chhaganbhai Ravjibhai, PW.6, Exh.11
- (7) Dr.Gulabbhai Parshottambhai Patel, PW.7,Exh.18
- (8) Police Constable Rameshchandra Eknath of Khergam
Police Outpost, PW.8, Exh.20
- (9) P.S.O. Ramdas Nathhubhai, PW.9, Exh.22
- (10) P.S.I. M.A.Chauhan, PW.10, Exh.23
- (11) Senior P.S.I. Mr.V.D.Rathod, PW.11,Exh.24
- (12) Dr. Raxaben Ranchhodji Desai, PW.12, Exh.25

The prosecution also relied on the documentary evidence which consists of map of scene of offence, panchnama of scene of offence, inquest panchnama, injury certificate, complaint lodged by the deceased, postmortem reports etc.

5. After recording of prosecution evidence was over, the accused was examined by the learned Additional Sessions Judge under section 313 of the Code of Criminal Procedure, 1973. The defence of the accused was that he was falsely involved in this case. However, the accused did not lead any evidence in defence.

6. The learned Additional Sessions Judge, after appreciating the evidence led by the prosecution and after hearing the parties, reached the following conclusions :-

- (i) The evidence of Dr.Gulabbhai Patel and Dr.Raxaben R.Desai and the postmortem notes exh.26 prove beyond reasonable doubt that Jeram Julia died a homicidal death.
- (ii) Child witness Jagdish was not an eye witness and did not witness the incident and, therefore, his presence at the place of incident is doubtful.
- (iii) In the F.I.R. names of eye witnesses are mentined, but name of Jagdish does not figure.
- (iv) F.I.R. was lodged after delay of 17 hours for which no explanation is offered by the prosecution.
- (v) The incident had taken place around 19.30 hours and immediately after the incident the deceased was taken to his house, yet Sarpanch who was residing in the adjoining vicinity, was not informed about the incident.
- (vi) The occurrence report which was lodged at Khergam Police Outpost, which had become dying

declaration after the death of Jeram Julia appears to be tutored version because the deceased was all throughout surrounded and accompanied by his wife, daughter Kanta and two sons-in-law namely Mangubhai and Ambubhai, who were inimical towards the accused.

- (vii) The dying declaration was quite inconsistent with the medical evidence of both the Doctors.
- (viii) The ocular evidence of the witnesses and the medical evidence was conflicting.
- (ix) The evidence of child witness Jagdish and daughter of the deceased namely Kanta was also contradictory to each other.
- (x) Even though condition of the deceased had become serious during night time, son-in-law Mangubhai was not called at the residence of the deceased and Mangubhai on his own did not inquire about health of his father-in-law. Therefore, conduct of the son-in-law was unnatural.

On the above referred to conclusions, the learned Additional Sessions Judge acquitted the accused of the offence under section 302 of B.I.P.C., which has given rise to this appeal.

7. Learned Additional Public Prosecutor Mr. M. A. Bukhari appearing for the appellant- State of Gujarat has taken us meticulously through the entire evidence on record. It is submitted by the learned A.P.P. that the deceased was in fit state of mind when he filed occurrence report at Khergam Police Outpost and, therefore, the learned Judge should have relied on it as dying declaration of the deceased for convicting the respondent under section 302 I.P.C. It is pleaded that the prosecution has proved motive behind commission of murder of the deceased by the respondent-accused and, therefore, appeal deserves to be allowed. The learned A.P.P. also argued that Mr. Dr. Ted Patel and Dr. Desai clearly established that the deceased died due to multiple injuries on the abdominal part which were possible by kick blows and, therefore, the appeal should be accepted.

8. Jeram Jaliabhai had died a homicidal death is not under challenge and it is proved beyond doubt that the deceased died a homicidal death on 28.7.1984. The question is whether accused was assailant who had given kick blows on the stomach and of the deceased and Alparbhai on his own did not find the body of the deceased. The incident in question had taken place on 27.7.1984 at about 19.00 hours. The child witness Jagdish PW.2, exh.7

has deposed that at the relevant time he was playing with other boys near the place of the incident. He deposed that the accused met his father Jeram and inquired whether his son-in-law was visiting his house or not. He stated that his father replied that his son-in-law was not visiting his house. On this reply being given by the father, the accused got enraged and gave kick blows on the stomach portion of his father. The child witness deposed that the accused had given 4 to 5 kicks to his father. He also deposed that Chhagan Ravji and one Nagali Bai had also witnessed the incident. He asserted that after the incident he had gone to call his sister Kanta. In the cross-examination, Jagdish admitted that when his father was attacked, he was playing with other boys and his attention was drawn only after his father called him for help. The deceased had lodged occurrence report at Khergam Police Outpost in which he has stated names of two eye witnesses. It is pertinent to note that name of Jagdish was not mentioned as eye witness in the occurrence report. Therefore, it raises serious doubt whether Jagdish was present when the incident took place. The statement of Jagdish was recorded by the investigating officer three days after the incident in question. Jagdish had never claimed before the investigating officer that he had witnessed the incident. It appears that after deliberation Jagdish was projected as an eye witness before the investigating agency and thereafter his statement was recorded under section 161 of the Code of Criminal Procedure. Jagdish in his evidence has not deposed that he had gone to call Sarpanch; whereas his sister Kanta has stated in her deposition that Jagdish had gone to call Sarpanch at night, but Sarpanch had told him that the deceased should be taken to Doctor. Therefore, there is quite contradictory statement made by two witnesses regarding the information given to Sarpanch during the night time. The evidence of Jagdish is highly unnatural and raises doubt about his presence at the place of the incident. In our opinion, learned Judge rightly discarded his evidence.

9. According to the prosecution witness Kanta, PW.3 Exh.8, her brother Jagdish had informed her that the deceased Jeram was attacked by the accused who had given him kick blows on stomach. On hearing this, the witness had gone to the place of incident and with the help of his brother and his aunt they had taken the deceased to his house. In the cross-examination, she has deposed that during the night time his father was speaking incoherently and his condition had become very serious and he was gasping for breath. She also deposed that her

father had become almost dead. It is surprising that in spite of this precarious condition of her father, she did not call her husband Mangubhai. In the cross-examination, she further deposed that they had reached Khergam at about 8.00 a.m. and they had remained in the Hospital for four hours. It is pertinent to note that occurrence report was lodged at Khergam Police Outpost at about 11.00 a.m. The Doctor who attended the deceased at Khergam Hospital has deposed that the deceased was given primary treatment and was referred to Valsad Hospital. The evidence of Kanta that they stayed at Khergam Hospital for four hours also raises serious doubts about her version of incident. Witness Kanta is having animosity towards the accused, as the accused used to call her mother-in-law a witch. The evidence of Kanta was rightly not relied on by the learned Additional Sessions Judge.

10. The son-in-law of deceased namely Mangubhai Vestabhai, PW.4, Exh.9 has deposed that on the next day morning Jagdish had come to call him, as condition of his father-in-law was serious. He asserted that he along with husband of sister of his wife Kanta and his mother-in-law had accompanied the deceased to Khergam by bus. It is deposed by him that the accused called his mother Shanti a witch. In the cross-examination, the witness deposed that they had not gone to the house of Sarpanch before proceeding to Khergam for treatment and to lodge complaint against the accused. He has deposed that when he reached at the house of his father-in-law, his condition was very serious and he was tossing in pain. He admitted that when the occurrence report was lodged at Khergam Police Outpost, he was nearer to his father-in-law and the occurrence report was recorded by the police constable in his presence. In the cross-examination, the witness deposed that relations between the accused and his family were good, but after the accused called his mother Shanti a witch, their relations had become strained. He admitted that if the accused is sent to jail, his family members would become happy. This admission on the part of the witness shows that he is on inimical terms with the accused and there is reasonable possibility that the accused was involved in the case falsely at the instance of this witness and his family members. In the background of these facts, lodging of occurrence report late assumes more importance. As per the evidence of witness Kanta they had reached Khergam at 8.00 a.m. but occurrence report was not filed earlier and it was only filed at 11.00 a.m. It is pertinent to note that even though the condition of the deceased was precarious and very serious, Sarpanch

residing in the neighbourhood was not called, nor was he informed about the incident.

11. Deceased Jeram Juliyabhai had lodged occurrence report at Khergam Police Outpost on 28.7.1984 at about 11.00 a.m. This occurrence report was recorded by P.W.8 Rameshchandra Eknath, who was Police Jamadar at Khergam Police Outpost. In this occurrence report, the deceased had stated that on last evening at about 7.00 p.m. he had gone to buy bundle of bidies and after buying bundle of bidies, he was returning to his house. It is further mentioned therein that when he reached near the house of Chhaganbhai Ravji, the opposite party Bhailubhai Janiyabhai (accused) met him and told him that whether his son-in-law was visiting his house or not. He replied that his son-in-law was not visiting his house. On giving this reply, Bhailubhai Janiyabhai became enraged and at once gave a kick blow on his stomach and leg. He also stated that when the kick blows were given by the accused, Chhagan Ravji and Govind Chhagan were present and had seen the incident. This occurrence report exh.21, after death of the deceased, had become admissible as dying declaration of the deceased under section 32(1) of the Indian Evidence Act. It is settled legal position that if the Court is satisfied that dying declaration is true and free from any embellishment, such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance, then the Courts have to look for corroboration. The dying declaration made by the deceased before Police Jamadar shows that the accused had given one kick blow on the stomach and one kick blow on the leg of the deceased. The so-called eye witness Jagdish has deposed that the accused had given 4 to 5 kick blows. Dr. R.R.Desai, P.W.12 exh.25 who performed the autopsy on the dead body of the deceased, found following injuries:-

(i) Rupture of spleen, (ii) Rupture of Right kidney, (iii) Rupture of large & small intestine, (iv) Severe Intra Abdominal Haemorrhage.

Dr. Desai in her cross-examination has admitted that looking to the nature of injuries, at least fifteen to twenty kick blows with great force must have been given to the deceased. She admitted that organs like spleen and kidney are both well protected in body. She also admitted that out of the two organs, spleen is more protected, as it is placed between tenth and eleventh ribs. She opined that to cause rupture of spleen and kidney one has to give kick blows with great force at back and also on front part of body. Her evidence if

closely scrutinized, would show that the internal injuries noticed on the body of the deceased Jeram were not possible by giving 4 to 5 kick blows. As per the dying declaration the respondent had given only one kick blow on the stomach and one kick blow on the leg of the deceased. As the medical evidence shows that the injuries noticed were not possible by giving even four to five kick blows, it is apparent that the dying declaration is quite inconsistent with the medical evidence.

As per the evidence of witness Kanta, condition of the deceased had become very serious and he was on the verge of death during the night time. This is stated by her in para-4 of her cross-examination. If the condition of the deceased was so precarious during the night time, he would not have been alive on the next day morning because he was not given any medical treatment during the night time. The child witness Jagdish also in para-6 of his deposition, has stated that during night time his father Jeram was tossing in pain and rolling on the floor and was on the verge of death. This admission on the part of Kanta and Jagdish raises a serious doubt in our mind as to whether the deceased was in fit state of mind to make dying declaration on the next day morning at 11.00 a.m. at Khergam Police Outpost. In our opinion, the dying declaration, because of these infirmities, cannot be called as true and genuine dying declaration of the deceased. The witnesses who have been named as eye witnesses in the dying declaration have not supported the prosecution case and have turned hostile. Thus, there is no independent evidence which corroborates the version of the prosecution case that the accused had given kick blows on the stomach and abdominal part of the deceased which had ultimately resulted into his death. In our opinion, the reasonings given by the learned Additional Sessions Judge in acquitting the accused are quite cogent and legal and no interference is called for.

12. This is an acquittal appeal in which court should be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such as case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to

restate the reasons for acquittal given by the trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi & Ors. vs. Bijendra Narain Chaudhary, A.I.R. 1967 S.C. 1124 and (2) State of Karnataka vs. Hema Reddy and another, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed.

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